

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,247

992

ROBERT J. SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

*United States Court of Appeals
For the
District of Columbia Circuit*
FILED MAY 5 1958

Fryel W. Stewart
CLERK

INDEX

	<u>Record Page</u>	<u>Appendix Page</u>
Complaint	1	1
Indictment	3	2
Plea of Defendant	4	2
Verdict	5	3
Motion to set Aside Verdict and Order New Trial	6	4
Denial of Motion to set Aside Verdict, etc.	9	5
Judgment and Commitment	10	6
Letter from Robert J. Smith to Honorable Judge Curran, asking for leave to Proceed with an Appeal in Forma Pauperis, Dated July 1, 1957	11	6
Granting of Motion to Appeal in Forma Pauperis	11	6
Notice of Appeal	13	8
Excerpts from Transcript of Proceedings:	20	9
Witnesses:		
Luther Thomas		
Direct	21	9
Cross	29	14
Redirect	33	16
Elroy A. Short		
Direct	35	17
Cross	40	19
Opening Statement of Defense	41	20
Elsie Hall .		
Direct	41	20
Cross	43	21
Sam Robertson		
Direct	48	23
Cross	50	24
Redirect	55	26
Elroy A. Short		
Direct (resumed)	55	27
Charge to The Jury	58	28
Verdict	67	32
Closing Argument by the Defense	75	33
Argument in Support of Defendant's Motion to Set Aside Verdict and Order New Trial	80	34
Ruling of The Court	83	36

JOINT APPENDIX

1 [Filed February 28, 1957]

IN THE MUNICIPAL COURT FOR THE DISTRICT
OF COLUMBIA

Criminal Division

COMPLAINT

Whereas Luther L. Thomas hath upon oath before me John Perry a Deputy Clerk of The Municipal Court for the District of Columbia, made complaint and declared that on the 16th day of February, A. D. 1957, at the District aforesaid, one Robert James Smith did then and there unlawfully by force and violence, by stealthy seizure and snatching steal, and take, carry away from the person and immediate actual possession of Luther L. Thomas money of the value of thirty-eight dollars all lawful money of the United States, of goods and chattels of Luther L. Thomas, against the form of the statute in such case made and provided, and against the peace and government of the United States of America.

WITNESS, The Honorable LEONARD P. WALSH, Chief Judge of The Municipal Court for the District of Columbia, and the seal of said Court this 18th day of February, A. D. 1957.

WALTER F. BRAMHALL
Clerk, The Municipal Court, D. C.

By /s/ John Perry
Deputy Clerk

2 [Filed February 28, 1957]

Judge Howard Precinct

No. US 1050-57

United States vs. Robert James Smith, 1549-4th Street, N. W.

Complaint - Robbery - Cepi. Atty. Regio.

Witnesses: Luther L. Thomas, 251 Vee Street, N. W., Apt. 21
Det. E. A. Short, Pct. #2 (Feb. 18, 1957)

C2 - 27- 57 Deft. \$5,000

Committed

Hearing held - Hearing waived.

Held to await the action of the Grand Jury Committed to Jail in default of recognizance in the sum of \$5,000 to appear in the United States District Court for the District of Columbia.

3 [Filed in Open Court Apr. 15, 1957]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled February 28, 1957, Sworn in on March 5, 1957

The United States of America	:	Criminal No. 374-57
v.	:	Grand Jury No. 296-57
Robert J. Smith	:	Robbery (22 D. C. C. 2901)

The Grand Jury charges:

On or about February 16, 1957, within the District of Columbia, Robert J. Smith, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and immediate actual possession of Luther L. Thomas, property of Luther L. Thomas, of the value of about \$34.00, consisting of one billfold, of the value of \$2.00, and \$32.00 in money.

/s/ Oliver Gasch
Attorney of the United States in and
for the District of Columbia

A TRUE BILL:

/s/
Foreman.

4 [Filed April 18, 1957]

PLEA OF DEFENDANT

On this 18th day of April, 1957, the defendant Robert J. Smith, appearing in proper person and by his attorney Robert I. Miller, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the D. C. Jail.

By direction of

John Sirica

Presiding Judge

Criminal Court #Four

Present:

HARRY M. HULL, Clerk

United States Attorney

By /s/ Daniel J. Mencoboni
Deputy Clerk

By T. Flannery

Assistant United States Attorney

R. Thiel

Official Reporter

5 [Filed May 24, 1957]

On this 24th day of May, 1957, came the attorney of the United States; the defendant in proper person and by his attorney Robert I. Miller, Esquire; whereupon the jurors of the regular Petit Jury panel serving in Criminal Court No. One, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

- | | |
|-------------------------|-------------------------|
| 1. Fred R. Woomer | 7. James Richardson |
| 2. Boyd M. Tyler | 8. Blanche S. Preston |
| 3. Agnes G. Tracy | 9. Eva M. Peres |
| 4. Walter H. Steinbauer | 10. Alice M. Peake |
| 5. Joseph Shea | 11. Dorothy S. McIntosh |
| 6. Monroe Russell | 12. Ollie F. Mason |

who are sworn to well and truly try the issue joined herein; whereupon after presentation of the evidence, arguments of counsel and the instructions of the Court, the jury retires to consider their verdict.

The jury returns into Court and upon their oath say that the defendant is guilty as charged. The defendant is remanded to the D. C. Jail and the case referred to the Probation Officer of the Court.

PRESENT:

By direction of

United States Attorney

Edward M. Curran

By J. Hannon

Presiding Judge, Cri. #1

Assistant United States Attorney

HARRY M. HULL, CLERK

D. Spatzer

By /s/ Harold G. Dodd

6 [Filed June 4, 1957]

**MOTION TO SET ASIDE VERDICT AND
ORDER NEW TRIAL**

Comes now your movant, Robert J. Smith, who moves that this Court set aside the verdict in the above numbered criminal case and enter upon the record an order for a new trial - your movant wishes to state the following reasons in support of this motion:

1. Your movant wishes to call the attention of this court to the testimony of the complainant in this case, Luther L. Thomas. The complainant testified to the effect he had made a "pickup" of a woman in a restaurant (American) in the neighborhood of 8th and P Street, N.W. and that on leaving the restaurant with the woman was attacked and robbed by four men with whom he stated he fought with for about fifteen (15) minutes. He was subsequently unable to recognize or identify any of his assailants or the woman prior to trial. He was obviously unable to do so at the time of trial without having been "aided" prior to his appearance in the Court room. The prosecution failed to produce the woman even though it is understood she was on subpoena to appear. No wallet belonging to the complainant was ever recovered in the possession of your movant or was it ever proven the complainant possessed such a wallet or the alleged contents or the chain that was supposed to have been broken in taking of the wallet as testified to by the complainant. The question was never answered as to his doubtful identification of any assailant prior to a trial.

7 There was never any proof introduced as to the complainant having been robbed. Your movant contends he has been victimized by a person who has apparently lost or given his money to a "lady of the night" during a tryst and must have some excuse to offer possibly his wife. Your movant contends he has been victimized by a lie and fabrication of the complainant from which the complainant cannot retreat. His testimony was so incredible as to be patently unbelievable.

2. Your movant feels he did not have the effective assistance of counsel. The Court must realize the defense lacked vigor due to the age and infirmities of Mr. Robert I. Miller. Your movant repeatedly tried to have Mr. Miller to investigate as to whether the complainant ever

possessed the alleged sum of money stolen and to also investigate the story of the complainant as regards the woman and her relation and credibility. Mr. Miller's infirmities prevented him from conferring with your movant and in taking any active part in investigating the allegations so the whole truth would come before the Court. Your movant has all due respect for Mr. Miller's past reputation and ability but his present advanced age has so limited his activities that a forceful and adequate defense was denied your movant or a completely different picture would have evolved.

PRAYER

Wherefore these premises considered your petitioner prays that this Court will appoint competent legal counsel to represent him and upon a hearing before the Court in proper person will examine the transcript of the Trial. Your movant prays that the Court will upon such
 8 proper hearing set aside the verdict of guilty, as it is not supported by the weight of evidence. Your petitioner prays that this Court will grant a new trial and such other relief as the Court may deem just, wise, and proper in the ends of justice.

/s/ Robert J. Smith
 200 - 19th Street, S. E.
 D. C.

[JURAT, dated June 3, 1957]

9 [Filed June 20, 1957]

On this 20th day of June, 1957, came the attorney of the United States, the defendant in proper person and by his attorney, Robert I. Miller, Esquire; whereupon the defendant's motion to set aside verdict and order new trial is heard and denied.

The defendant is then sentenced to 2 years to 7 years and remanded to the D. C. Jail.

By direction of

PRESENT:

United States Attorney

By J. Hannon

Assistant United States Attorney
 D. Spatzer

Edward M. Curran
 Presiding Judge Cri.
 Court #1

By /s/ Harold G. Dodd
 Deputy Clerk

10 [Filed June 24, 1957]

JUDGMENT AND COMMITMENT

On this 20th day of June, 1957 came the attorney for the government and the defendant appeared in person and by counsel, Robert I. Miller, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of Robbery as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years to Seven (7) years.

IT IS ORDERED that the clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward M. Curran
United States District Judge

11 [Filed December 2, 1957]

Washington, D. C.
July 1, 1957

Re: Notice of Appeal in Criminal Case

Honorable Judge Curran:

I am writing you this regards my notice of appeal which I have filed along with a forma pauperis. Will you please consider the facts I state here as in support of my application to proceed in Forma Pauperis.

(1) At the time of the alleged offense the complainant Luther Thomas made a statement to the detectives handling the case that he had lost \$38.00 in the alleged robbery. The detectives showed me the statement signed by Luther Thomas, but at the time of trial Mr. Thomas said he lost \$32.00.

Handwritten note:
Have to appeal in forma pauperis. I am writing you this regards my notice of appeal which I have filed along with a forma pauperis. Will you please consider the facts I state here as in support of my application to proceed in Forma Pauperis.

(3) Mr. Thomas testified he had his wallet attached to a chain but stated the chain broke when he was robbed. He never produced the broken part of the chain. Doesn't this strike one as a most unusual way to carry a wallet? I have seen books chained in a library but I have never heard of anyone chaining a wallet.

(4) At the precinct the said Mr. Thomas made three attempts to identify a suspect. On his third try a detective was standing near me and put his hand on my shoulder to obviously indicate the one to pick. I have a witness by the name of Donald Hall who will testify to this and that there were only five people in the line-up including me. At the time of trial Mr. Thomas said there were 9 men in the line-up and the detectives stated there were 11 men in the line-up. Again it becomes obvious someone was lying about it.

(5) In my Motion to Set Aside Verdict and Order a New Trial I called the attention of the Court to the fact that Mr. Miller was unable to
12 present the facts in my case. Prior to trial Mr. Robert I. Miller never conferred with me at any time. The records of the D.C. Jail will prove this statement as they keep a record of everytime an attorney visits a client at the D.C. Jail. So this is a simple matter to prove. Mr. Miller's wife called me out three (3) times and each time said she was too busy to spend any time with discussing the case. As a result I did not have the benefit of witnesses I needed in my behalf. It is a recognizable fact that Mr. Miller is too old and infirm to present a forceful and adequate defense and his wife can't do it for him. I told Mr. Miller I wanted to take the stand during the trial but he wouldn't let me with the admonition "You don't have to, I have the case beat." I told him I had a record during the trial, but I still wanted to take the stand.

Judge Curran, the truth in this case has not come out as will be shown in the conflicting statements made by the complainant Luther Thomas. I personally don't think the man was ever robbed. He did not pick me as a suspect until the detective put his hand on my shoulder during the line up and further I have never known the man before. Mr. Thomas has lied to cover up something.

I trust you will take these facts into consideration in support of my application for leave to proceed with an appeal in forma pauperis. I submit this in good faith.

Thanking you for your kindest attention, I remain

Respectfully yours,

/s/ Robert J. Smith

13 [Filed Dec. 2, 1957]

NOTICE OF APPEAL

Name and address of appellant: Robert J. Smith, Box 25, Lorton, Va.

Name and address of appellant's attorney:

Offense Robbery, (22 DCC 2901)

Concise statement of judgment or order, giving date, and any sentence

Sentenced to imprisonment for a period of two years to seven years.
Curren, J. 6-20-57

Name of institution where now confined, if not on bail: Lorton Reformatory, Box 25, Lorton, Va.

I, the above- named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

December 2, 1957
Date

/s/ Robert J. Smith
Appellant

Attorney for Appellant.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

20 [Filed February 21, 1958]

UNITED STATES OF AMERICA	:	
vs.	:	Criminal Action
ROBERT J. SMITH,	:	No. 374-57
Defendant	:	

U. S. Court House
Washington, D. C.
Friday, May 24, 1957

The above-entitled matter came on for trial before HONORABLE EDWARD M. CURRAN, a judge in the United States District Court, and a jury at 10:00 a. m.

APPEARANCES:

JOSEPH M. HANNON, ESQ. , for the Government.

ROBERT I. MILLER, ESQ. , for the defendant.

21

LUTHER THOMAS

DIRECT EXAMINATION

BY MR. HANNON:

Q. Where do you live? A. I live 206 "V" Street, Northwest.

Q. I direct your attention to Friday, February 15, 1957, and ask you whether you were employed on that date? A. Yes, I was.

Q. Did you get paid on that day, sir? A. Yes, I did.

Q. What time was it that you got off work? A. I got off from work at a quarter to seven.

* * * *

22 Q. How much was that that you were paid? A. Well, I drew \$72.39.

* * * *

Q. Mr. Thomas, what did you do after you got off work? A. I went to the barber shop and got a hair cut and after that, then I stopped at this American Lunch for something to eat.

Q. What time did you get to the American Lunch? A. I got to American Lunch, I would say, about a quarter after eight, I guess, just about.

Q. 8:15 in the evening? A. Yes, I did.

* * * *

Q. What did you do at the American Lunch? A. Well, I generally goes there and eat once in a while and I was sitting at the counter eating at that time and while I was eating, there was a lady that was sitting next to me and I had a wallet, about this long (indicating) in my pocket I generally carry some of the money, and while I was sitting there eating, so this lady was sitting next to me, so she said to me, "Ain't you
23 afraid to --

MR. MILLER: I object to this.

THE COURT: Sustained.

MR. MILLER: Out of the presence of the defendant.

THE COURT: Sustained.

MR. MILLER: Any conversation or anything that happened with the lady.

BY MR. HANNON:

Q. You met a lady, is that what you said, sir; is that correct?

A. Well, she was sitting there, yes.

Q. What time did you leave the American Lunch? A. I left

American Lunch at just about, I'll say, between 12:30 or twenty minutes to 1:00.

Q. Did you leave alone, Mr. Thomas, or was there somebody with you? A. A lady was with me.

Q. After you left the American Lunch, where did you go? A. I walked to 7th and H, which is in the 1500 block of 8th. In fact, me and the lady were walking between the 1500 block of the figure 8 Street, Northwest.

Q. Eight? A. The figure 8, yes. And while we were walking, me and her were talking, and I seen four men were charging into me.

24 Q. Let me ask you this before you tell this Court that. This 1500 block of 8th Street, Northwest? A. Northwest.

Q. Is that in the District of Columbia? A. Yes, that's right, Washington, D. C.

Q. What was it that you saw? A. I saw four men coming to me and when I knowed anything I was beginning to be hit.

Q. By whom? A. By Robert Smith, (Pointing) and three other men.

Q. Was he one of the four men that you saw coming towards you?

A. Yes, he was. I didn't know him then until after I grabbed him.

Q. Tell us about it. What happened after they started hitting you?

A. Well, what happened, while I was going down the street, me and this lady were talking. In fact, I seen these four men were coming into me. When I knowed anything, I was hit. In fact anyway, I started fighting back and before I knowed anything, in fact, 15 or 20 minutes all four of us, from half way the block backward and forward. And while I was fighting, so Robert Smith and the other three men, they all were around me fighting me.

25 Q. When you say Robert Smith, sir, do you see that person in Court this morning? A. Yes, sir. I do.

Q. Where is he please? A. He is sitting right there. (Pointing)

Q. How is he dressed? A. Well, at that time --

Q. No. How is he dressed now? A. No, he wasn't dressed that way.

Q. How is he dressed now? What is he wearing now? A. He is wearing a white shirt and a pair of green pants.

MR. HANNON: May the record show, Your Honor, that he has identified the defendant.

THE COURT: Very well.

BY MR. HANNON:

Q. All right, now, would you continue? A. During that time which we were fighting, in fact, I was just running from one side of the street, in fact, I was about to get tired and I was hollering, hollering for some help and, in fact, the lady was with me, which I thought that she would try to help me. So, what happened, after they ganged me so while fighting then this pocketbook that I had a chain on, and the chain snapped, then I know that my wallet was gone then. It was snatched half
26 way of my pocket.

Q. Is that the time you were fighting with the four men? A. It was during the time I was fighting.

Q. Was Defendant Smith one of the four men at the time? A. At the time, yes, sir. So what happened, in fact, I couldn't identify the four men at all at that time, because I was fighting them and all like that. So when I heard the pocketbook chain snap, that is when I know my wallet was gone. So the other three fellows, they ran and when they ran, that is when I reached up and grabbed Smith. So while I had Smith, I didn't know who I was fighting, so when I got myself together and I happened to look up and I spied him, so I said to him, I say, "You ought to be ashamed of yourself, I wouldn't know that you would be in this."

Q. Let me ask you this, Mr. Thomas: Had you ever seen him before? A. I seen him twice.

Q. On two occasions before? A. Well, I saw him once where I worked at and I had to deliver down where he worked at.

Q. Did you know his name? A. No, I never knowed his name.

Q. When you say you looked up at him and you said something
27 to him, what did you say to him? A. I said to him, I said, "I am surprised at you being in such stuff as this," and I said he rob me. I

said to him, "Just do this, just give me my wallet back, you all can keep the money." So I lost one of my rubbers off my shoes at that time by doing the fighting. So he picked up the rubber and throwed it back at me, which I thought at the time that when he went back to the crowd, the three men and himself went back to the crowd, so I thought he might tell the fellows at the time.

Q. When you told him he should be ashamed of himself, where were the other three men? A. The other three men had gone standing down waiting to see was he going to get away from me or not.

Q. At the end of the block? A. In the same block in the 1500 block.

Q. And then he walked down to them? A. He walked down to them. Before he walked to them he throwed me my rubber back I had lost off my shoe by scuffling.

Q. What happened then, sir? A. And then while I was standing there, so he went back to the crowd, and the girl that I was talking to, she was in the crowd with them. I thought he might tell the fellows he
28 knowed me. I thought maybe I will get my wallet back. So at that time while I was standing there I got to thinking. I said, "Gee, I am lucky to get out like I was," so I took up and started running and I run back to Seventh and "P", Northwest, where I was at American Lunch. So I goes back into the place to tell the man because he knows that I am a customer --

MR. MILLER: Wait one minute. Object.

THE COURT: I sustain the objection.

BY MR. HANNON:

Q. Mr. Thomas, did there come a time that you reported this matter to the police? A. Yes, right at that time, I run back to Seventh and "P". An officer was coming across the street at the very time. So , I said to him --

MR. MILLER: Object to that, please.

BY MR. HANNON:

Q. Just answer the question. Did there come a time that you reported this matter to the police? A. Yes, I did, right away.

Q. How much was the billfold, sir? How much was it worth?

A. I had \$32 in the billfold.

Q. And that was gone? A. And I had the rest of the money in my suede jacket pocket up here. (Indicating). I put some there because that
29 is the amount of money generally I takes home.

Q. How much money was taken from you? A. \$32 was taken from me.

Q. Was your billfold also taken? A. The billfold and all my papers and everything.

Q. And is it valued at about \$2.00? A. Well, no, my pocketbook is valued at more than that, four dollars and some cents.

* * * *

CROSS EXAMINATION

BY MR. MILLER:

Q. Mr. Thomas, do you remember testifying at a preliminary hearing over in police court some time ago, do you remember, over before one of the judges in the Municipal Court? A. Do I remember?

Q. Yes, sir? A. No, I never remember testifying.

Q. Do you tell his Honor and the jury you didn't testify in the Municipal Court? A. I testified that I identified this man.

Q. No. I am asking you, will you please answer my question and
30 we will get along much better.

Do you remember testifying in Municipal Court? That is the building over at Fifth and E. A. Do I remember testifying?

Q. You didn't testify over there, did you? A. No, I haven't testified nowhere but right here.

Q. What? A. I haven't testified nowhere but right here in the case.

Q. And you tell His Honor and the jury you never testified over there in a hearing in this case? A. In the hearing in this case? No more than at the United States Court here.

Q. In what? A. In the Court here.

Q. In the Court here? A. That is correct.

Q. Do you tell me that I appeared over there for this man and I asked you some questions and you say you weren't there? Is that right?

A. You never asked me no questions.

Q. And you weren't there? A. You never asked me any --

THE COURT: Were you there?

31 THE WITNESS: He never asked me any questions.

THE COURT: Were you over there?

MR. MILLER: He said he wasn't, your Honor.

THE COURT: Did you appear in the Municipal Court on February 18, 1957?

MR. MILLER: He said he wasn't, Your Honor.

THE WITNESS: Yes, I was there.

THE COURT: Did you testify?

THE WITNESS: Oh, I thought he said he asked me some questions.

THE COURT: I am asking you, did you testify?

THE WITNESS: I testified there. Yes, I did.

BY MR. MILLER:

Q. Well, why did you tell His Honor and the jury before the distinguished Justice asked you a question, that you didn't testify? A. I didn't quite understand what you meant by "testifying".

Q. And isn't it the truth, over there, that you said --

MR. HANNON: Wait just a minute. May we have a question and then what he said? I think it is the proper way to do it, Your Honor.

MR. MILLER: All right. I will withdraw that.

BY MR. MILLER:

32 Q. Isn't it the truth that you testified that this was on a Saturday night? A. On a Saturday night?

Q. Yes? A. It was on a Saturday early morning.

Q. Saturday early morning? A. Yes.

Q. You are sure about that? A. Yes, after 12 o'clock, it was.

Q. Now, you remember when the man was brought to the station house? A. Yes, I do.

Q. Isn't it the truth that he told the policeman that he hadn't robbed you or hadn't anything to do with it? A. That is what he told the police.

Q. Now, have you talked to that policeman this morning? A. Have I talked to him? No, I haven't said one word since this man has been caught.

Q. Is the woman that was with you here this morning? A. No, I don't know where she is at.

Q. How? A. No, I don't know where she is at.

Q. Did you make an effort to bring her here? A. The officers were looking for her.

33 Q. Did you or the police make an effort to bring her here? A. If he could find her, yes, sir.

MR. MILLER: That is all I want to ask you.

THE COURT: Is that all?

MR. HANNON: No, Your Honor.

REDIRECT EXAMINATION

BY MR. HANNON:

Q. Mr. Thomas, did there come a time that you saw Smith at the precinct? A. How many times? Only twice. I saw him twice.

Q. The first time after this alleged robbery, did you see him at a police precinct? A. I only seen him just twice all together.

Q. Did you see him in a lineup? A. Yes, I did.

Q. Where was that? A. That was down at No. 2 Precinct.

Q. And what day was that? A. That was on a Sunday.

Q. How many men were in that lineup, sir? A. Well, at that time, I think there was about, I guess, about 11 or 12 men.

Q. Did you pick him from the lineup as the man who had robbed you? A. Yes, I did.

34 Q. After you picked him, was he questioned by the police in your presence? A. Yes.

Q. What did he say? A. He said he didn't know me.

Q. He said he didn't know you? A. That is right.

Q. Did he say whether or not he had robbed you? A. He said that he didn't rob me.

Q. He didn't rob you? A. That is right.

Q. Did you have occasion to talk to him later on at that time?

A. Well, at that time, I said to him, I say, "You ought to be ashamed of yourself," I said, "to do a thing like that."

That was at No. 2 Precinct.

So, he still admit that he didn't rob me. So, anyway, after I identified him and all, then the officer -- yes, that is when he called me and said he wanted to talk to me and I said, "Well, I don't want to talk to you."

Q. When he called you, what did he call you by? Did he call you by name? A. He told me, "Come here, Thomas." That is right.

35 Q. He called you by name?

MR. MILLER: He said he didn't brother.

He said, "Come here."

THE COURT: You said, "Thomas," didn't you?

MR. HANNON: That is as I understand it.

THE COURT: Did he say, "Come here, Thomas," or what did he say.

THE WITNESS: He called me Thomas. That is what he called me.

MR. MILLER: He said, Your Honor, he called him.

THE COURT: Thomas.

(The last two questions and answers were read.)

BY MR. HANNON:

Q. What is your name, sir? A. Luther L. Thomas.

Q. Mr. Thomas, this woman that you left with, do you know her name? A. No, I don't know her name.

Q. Do you know where she lives? A. I don't know where she lives.

* * * *

ELROY A. SHORT

* * * *

36 Q. In your capacity, sir, as a detective, were you assigned to investigate an alleged robbery that occurred on February 16, 1957, in the 1500 block of Eighth Street, Northwest? A. I was, sir.

Q. Did you make an arrest in connection with that investigation?

A. I had my partner working midnight cruiser and I had him make the arrest for me.

Q. Prior to the arrest, had you received certain information?

A. Yes, sir.

Q. From whom, please? A. From the report that had been made by --

37 MR. MILLER: Of course, I object to this.

THE COURT: No, not what it was. Just did you receive it? Not what it was. You did receive a report?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. HANNON:

Q. If you know, Officer Short, who was arrested? A. The defendant there, Robert James Smith.

Q. The man in the white shirt, sir? A. Yes, sir.

MR. HANNON: May the record show, sir, that he has identified the defendant.

THE COURT: Very well.

BY MR. HANNON:

Q. After he was arrested, what was done? A. I questioned him about this offense and he denied that he was connected with it. That was about ten o'clock in the morning. About 10:30 he was placed in a lineup with seven other men -- nine other men, at No. 2 Precinct.

Q. This was about 10:30 on the morning of February 17? A. Yes.

Q. Is that a Sunday morning? A. Sunday morning.

And the complainant was brought to the precinct and he picked Mr.

38 Smith out of the lineup as the man that had robbed him, as one of the men that had robbed him. I questioned him about it and he denied it in front of Mr. Smith. He said -- I asked him first did he know anyone by that name. So, he says, "No."

Q. Anyone by what name? A. By Luther Thomas.

Q. Was Mr. Thomas present at the time? A. Not at that time, no, sir.

So when Mr. Thomas picked him out of the lineup, the first thing he said was, "Mr. Thomas, you know I'm not one of the men. You know I didn't bother you."

MR. MILLER: Didn't what? What did you say?

THE WITNESS: He said, "Mr. Thomas, you know I'm not one of the men."

THE COURT: You had already told him the name of the complainant was Mr. Thomas, hadn't you?

THE WITNESS: Yes, sir.

BY MR. HANNON:

Q. Did he say anything else, sir? A. Yes, sir. We went upstairs and Mr. Thomas told me how he told him, rather everything about how it had happened and everything. He denied that. Then he asked Mr. Thomas could they talk about it. Mr. Thomas told him that he didn't
39 want to talk about it. He just wanted his pocketbook and his money back.

Q. Did Smith say anything to that? A. No, sir.

Q. Officer Short, in other words, to clear this up, did there ever come a time that he was confronted by Mr. Luther Thomas at which time he said he did not know Mr. Thomas? A. Yes, sir. He said he didn't know him.

Q. At that time, had you mentioned Thomas' name? -- to the defendant? A. I believe I did. I believe I mentioned to him when I first talked to him in the precinct early that morning when I first talked to him. I asked him did he know a man by the name of Luther Thomas.

Q. And at that time he said no? A. No, he didn't know.

Q. Did there ever come a time that he admitted to you that he did know Luther Thomas? A. No, sir. He said he had seen him before. He didn't know him.

MR. HANNON: That is all, Your Honor. No further questions.

40

CROSS EXAMINATION

BY MR. MILLER:

Q. Sergeant, when you went up to his home on the Sunday morning and talked to him, he denied having anything to do with this, didn't he, brother?

A. Well, I talked to him in the precinct on Sunday morning. He denied it.

Q. Did you arrest him? A. My partner picked him up.

Q. Is your partner here? A. No, sir.

Q. How? A. No, sir.

Q. Where is your partner? A. I don't know. He is home, I guess. He is off today.

Q. Then you talked to him at the precinct and at the precinct he told you that he didn't know Mr. Thomas and that he didn't rob him; isn't that the truth, Sergeant? A. He told me that he was home that night.

Q. Yes, sir, and didn't he tell you that his aunt and one of the roomers was there? You didn't talk to them at the house, did you?

A. I talked to him about it. I didn't talk to them.

41 Q. And he told you he was home in bed at this time, didn't he?

MR. HANNON: I object to that. It is self-serving.

THE COURT: It is.

MR. MILLER: Sir?

THE COURT: It is self-serving. Is that all?

MR. MILLER: That is all for him.

MR. HANNON: Thank you, sir. The Government rests.

* * * *

OPENING STATEMENT OF DEFENSE

MR. MILLER: Ladies and gentlemen of the jury, I expect to show you from the evidence that the defendant was home on this Saturday night, that he arrived home some time in the evening before 10, 11 o'clock and was in bed from that time until the good officers came and arrested him.

* * * *

ELSIE HALL

* * * *

42 BY MR. MILLER:

Q. What is the name, please? A. Elsie Hall.

Q. Now, on the evening of the 16th-- A. Well --

Q. Wait a minute now, will you please? On the evening of the 16th, what time did this boy come home, do you know? And tell me

what day of the month it was? A. Well, on February 16, Robert carried milk across the street to Mrs. Ida May Gardner's who he has the baby by.

Q. That is all right. What time did he get home? A. And he come back in at 9 o'clock.

Q. And did he leave the house at all? A. No, he didn't. He went to bed.

Q. Until the officers arrested him? A. That is right and he went to bed and so I sat up that night around until about 2:30 in the morning watching the late show, and so, well around about twenty minutes to six, a quarter to six, someone knocked on my door and I got up and asked who
43 it was. They said, "The law."

Q. That's right. The officer is -- that officer is not here? A. No, he is not.

Q. You are absolutely sure? A. I am sure that Robert was in the house. He came in at 9 o'clock. He did not go back out the house until the law carried him out and that was when they got him out of bed.

MR. MILLER: All right, young man.

CROSS EXAMINATION

BY MR. HANNON:

Q. Mrs. Hall, what relationship is there between you and the defendant, Smith? A. Well, that is my nephew.

* * * *

44 Q. Now, that was Saturday night that he went to bed at 9 o'clock, is that right? A. That is right.

Q. Now, that was February 16? A. 16.

Q. Now, the day before was the 15th and the day before that was the 14th, February 14. A. Yes.

Q. Thursday night. Thursday night, now. Do you understand, on February 14? A. Yes.

Q. Where was he that night? A. On Thursday night?

Q. Yes? A. Well, he was at home.

Q. Was he home all Thursday night? A. That is right.

Q. Where was he Wednesday night? A. Wednesday night?

Q. Yes. That would be the 13th, I believe. A. He also was at home.

Q. What time was he at home? A. Well, he always was in the house around 9 o'clock, I should say.

45 Q. How old is he? A. He is about 25 or 26.

Q. Now, Tuesday, February 12, where was he that night? A. Oh well, I can't think back, you know, as far as those nights.

Q. You can remember -- A. Yes.

Q. You can remember Wednesday, February 13, he was at home; is that right? A. Yes, that is right.

Q. How do you remember that? A. How do I remember that?

Q. Yes? A. Because he always came and got me from work.

Q. What time did he get you from work? A. Get me from work? Well, he always got over there, I'll say around about 7.

Q. He picked you up from work? A. That is right.

Q. He drove you home? A. That is right.

Q. Then what did he do? A. What did he do?

46 Q. Yes? A. He usually went upstairs and played his radio. He has another little thing, a recording thing, and then he usually goes to bed.

Q. Does he go out any nights at all? A. Beg pardon?

Q. Did he go out any nights at all? A. Well, now, of course you didn't ask me anything about Friday night. Friday night he went to Bertha Gibson's house.

Q. Where is Bertha Gibson's house? A. She lives over in the 1600 block of 4 Street, the same street.

Q. What time did he leave to go to Bertha Gibson's house? A. Bertha Gibson's?

Q. Yes? A. Well, I guess he left around -- let me see -- I don't know exactly, you know, the right hour on Friday night, but I think it was around about 9 o'clock that he went over there to carry some dresses.

Q. Do you remember what time he came home? A. I think he came in -- I think on that night he did get in around 11, a little bit before 11, on that night.

Q. On Friday night, the 16th? A. Yes, on Friday night, the 16th.

47 Q. How do you remember that? A. How do I remember that?

Q. Yes? A. Because, well someone called there for him and he left his address, the telephone number where he would be.

Q. Who called him? A. Well, I don't know. I didn't ask who it was, but someone called.

THE COURT: When was he arrested?

THE WITNESS: When he was arrested? He was arrested February 17, which was on a Sunday morning.

THE COURT: The 16th was Saturday.

THE WITNESS: The 16th was Saturday and the 17th was on a Sunday. I am sure of that.

* * * *

Q. Mrs. Hall, do you know when the Government says that this robbery occurred? A. Oh well, it was 12:45 Saturday morning, wasn't it? That is what was on the paper.

Q. What would that be, just after midnight Friday? A. According to that, it would be just after midnight Friday.

Q. Where was Defendant Smith just after midnight Friday night?

48 A. He was home and in bed.

Q. He was in bed? A. Home in the bed.

Q. And he was in bed Friday night? A. That is right.

Q. He was in bed Saturday night? A. That is right.

Q. And he was in bed Thursday night, the 14th? A. Yes.

Q. And he was in bed Wednesday, the 13th?

MR. MILLER: Your Honor, he has gone all over that once. I suggest --

THE COURT: Yes, you have been over it once.

MR. HANNON: I have no further questions.

* * * *

SAM ROBERTSON

* * * *

BY MR. MILLER:

Q. Now, will you be good enough to talk out loud and tell me your name? A. My name is Sam Robertson.

49

Q. What is your name? A. Sam Robertson.

Q. Where do you live, Sam? A. 1549 4th Street, Northwest.

Q. That is where the boy lives sitting there? A. Yes.

Q. Now, on Saturday night, the 16th, do you remember, was he home on that night? A. Yes.

THE COURT: Saturday night wasn't the 16th was it --

MR. HANNON: I have an objection.

MR. MILLER: What day was it, your Honor.

THE COURT: The 16th was Thursday.

MR. MILLER: Well --

THE COURT: February -- No, '57 it is, isn't it.

MR. HANNON: Yes.

THE COURT: You are right. It is Saturday, 1957.

MR. MILLER: Thank you, Your Honor.

BY MR. MILLER:

Q. On Saturday the 16th, he was home, wasn't he? Do you remember what time he came in? A. Well, I came in from work about--

Q. Talk out loud, will you? A. I come in from work about 7:30.

50 Q. Was he there? A. And he was there when I got there. It was around 8 when I got there.

Q. Was he there all evening while you were there? A. Yes, sir.

Q. How? A. Yes, sir.

Q. Were you there when the police came on Sunday morning?

A. Yes, sir.

Q. And you are absolutely sure he was there? A. Yes, sir.

MR. MILLER: O.K. Go ahead, brother.

CROSS EXAMINATION

BY MR. HANNON:

*

*

*

*

51

Q. Does he live in your house? A. He lives with his aunt and I stay there.

Q. He lives with his aunt, that is Mrs. Hall, and you stay there; is that right? A. That is right.

Q. You worked all day Saturday? A. Yes, sir.

Q. And got home about 7:30 Saturday evening? A. Yes, sir, a quarter to 8, something like that.

Q. Now, if Saturday was the 16th --

MR. MILLER: He said it was.

BY MR. HANNON:

Q. Thursday, sir, was the 14th, February 14th. A. The 16th.

Q. Now, I am talking about the previous Thursday. Thursday was the 14th, Friday was the 15th and Saturday was the 16th. A. Yes.

Q. Do you know where he was Thursday night, February 14th?

A. He was home.

MR. MILLER: What did he say? I couldn't hear.

MR. HANNON: He said he was home.

BY MR. HANNON:

52 Q. What time did he get home? A. Well, he was home when I got there. He was home when I got there.

Q. At 7:30? A. Yes, about 7:30, a quarter to 8.

Q. You are absolutely certain that on Thursday night, the 14th, he was at home? A. Yes, sir.

Q. How about the following night? Do you know where he was the following night? That would be Friday the 15th. A. Well, he was always home every night when I get there. He always stayed in.

Q. Well, when you get home, what do you do? A. Well, I stay around and listen to television and sit up a while, eat my supper.

Q. What time did you go to bed on Thursday the 14th? A. I don't know. I hardly ever go to bed before 12 o'clock at any time.

Q. Well, on Thursday the 14th up until 12 o'clock midnight, was he at home with you? A. Yes, sir, he was home.

Q. Watching television? A. Yes, sir.

Q. All right. Now, on Friday night, the 15th, what time did you go to bed then? A. I don't know exactly what time.

53 Q. About what? A. About 10 or 11 o'clock, something like that.

Q. Do you remember where he was when you went to bed Friday night? A. He was up there in his room.

Q. He was upstairs in his room? A. Yes.

Q. How do you know that? A. Well, I went to the bathroom and he was in there. His room is right off the bathroom.

Q. You can remember going to the bathroom on Friday night, February 15th and seeing him in his room? A. Yes, sir, he was in his room.

Q. On the 15th now? A. Yes.

Q. And you remember that he was there also Saturday night on the 16th? A. Saturday night, yes.

Q. All right. Now, when you went to bed you said you went to bed about 10 or 11 o'clock Friday night, the 15th; is that right? A. That is right.

54 Q. Do you know where he was at 45 minutes after midnight that night? A. He was up there in the bed.

Q. Pardon me? A. He was upstairs in his room.

Q. You told us you had already gone to bed at 10 o'clock. A. Yes.

Q. Or 11 o'clock; is that right? A. Well sometimes then.

Q. And about three hours later, you knew he was upstairs in his room? A. Yes.

Q. How did you know that? A. I went to the bathroom.

Q. Again? A. Went to the bathroom.

Q. Again; is that right? A. That is right.

Q. Did you go to the bathroom at precisely 12:45 a.m.? A. I didn't pay no attention to the clock. I didn't keep no time.

MR. HANNON: All right. No further questions.

MR. MILLER: That's all, brother. That's all. I forgot to ask Your Honor -- I overlooked one question. May I ask him?

55

REDIRECT EXAMINATION

BY MR. MILLER:

Q. What do you do for a living, brother? A. I work at the U.S. Barber Shop.

MR. MILLER: Thank you. That is all.

That is all for you. Is the other officer here yet?

MR. HANNON: I call officer Short again, Your Honor.

MR. MILLER: That is our case, Your Honor.

* * * *

ELROY A. SHORT

* * * *

DIRECT EXAMINATION

BY MR. HANNON:

* * * *

Q. Officer Short, you heard the testimony of Mr. Robertson; is that correct? A. Yes, sir.

56 Q. And Mrs. Hall? A. Yes, sir.

Q. Did you have occasion to question Smith with respect to his whereabouts at 12:45 a.m., that is, 45 minutes after midnight on February 16? A. I did, sir.

Q. Would you relate to his Honor and the ladies and gentlemen of the jury what it was that he told you? A. He told me he left his girl friend's house on "P" Street about 11:30 that night, Friday night, and that he got home and he went downstairs in the kitchen for a while and then he went upstairs and he told his aunt to wake him up and he knocked on the door and she must have been asleep, he said, because he didn't get any answer. And I asked him was there anyone that he knew that I could go to that knew he was home at 12:30 on February 16, and he told me the only one that he knew would have been his aunt, and I asked him did she see him. He said he didn't know if she saw him or not, but he remembered knocking on her door for her to wake him up so that he could go to work in the morning and that she didn't answer him.

MR. HANNON: That is all, Your Honor.

57 BY MR. MILLER:

Q. He definitely told you, Sergeant, that he had nothing to do with this case, didn't he? A. Oh yes, he told me.

Q. And isn't it true he told you that he got home on the 16th and went to bed; isn't that the truth? A. He told me, yes, sir.

MR. MILLER: That is all.

THE COURT: Is that all?

MR. HANNON: That is all.

MR. MILLER: Again, that is our case.

MR. HANNON: That is all, Your Honor.

58 THE COURT: Ladies and gentlemen of the jury, the defendant in this case, Robert J. Smith, is charged in an indictment containing one count, which alleges that on or about February 16, 1957, within the District of Columbia, Robert J. Smith, by force and violence and against resistance and by sudden and stealthy seizure and snatching, and by putting in fear, stole and took from the person and immediate actual possession of Luther L. Thomas property of Luther L. Thomas of the value of about \$34.00, consisting of one billfold of the value of \$2.00 and \$32.00 in money.

As you know from your experience, this paper writing that I just read to you is the indictment in the case. It is not evidence in the case and is not to be considered by you as evidence in the case. It is merely the charge or allegation that has been made by the Government against the defendant, each material part of which must be proved and proved beyond a reasonable doubt. The fact that a man has been charged with a crime is not evidence that the crime has been committed. So, you will not consider this paper writing which is the indictment as evidence against this defendant.

This defendant is presumed to be innocent, and that presumption abides with him throughout the progress of the trial until such time as it is overcome by evidence establishing his guilt beyond a reasonable
59 doubt. The burden is always upon the Government in a criminal case to prove a defendant guilty beyond a reasonable doubt. That doesn't mean that the Government must prove a defendant guilty to a mathematical or absolute certainty. The Government has met its burden if it proves a defendant guilty to a moral certainty, or as it is stated in the law, proves a defendant guilty beyond a reasonable doubt.

Now, a reasonable doubt as you know, ladies and gentlemen of the jury, is a doubt founded on reason. It is a doubt for which you may

give a reason. It is something of substance as compared to something that is shadowy. It is such a doubt as will leave a juror's mind, after a careful and candid investigation of all the facts and circumstances, so undecided that he cannot say that he has an abiding conviction of the defendant's guilt, or such a doubt as in the graver and more important transactions of life would cause an ordinary and prudent person to hesitate and pause. A reasonable doubt, ladies and gentlemen of the jury, may arise not only from the evidence produced, but also from the lack of evidence. The law does not impose upon the defendant the duty of producing any evidence. The burden is always upon the prosecution to prove a defendant guilty beyond a reasonable doubt of every essential element of the crime charged, and a defendant has the right to rely upon the
60 failure of the prosecution to establish its case beyond a reasonable doubt.

And while it is true that the law does not require that proof of a crime be made to a mathematical or absolute certainty, of course it does not permit men to be convicted of crime on mere suspicion or possibility of guilt. In other words, to justify conviction, the evidence should be such that when you consider it carefully and apply it to your sound conscientious judgment as reasonable men and women, you can say that you have no reasonable doubt of the guilt of the defendant. If it would fall short of convincing you to that extent, this defendant should be given the benefit of a reasonable doubt and found not guilty.

If after an impartial comparison and consideration of all the evidence you can candidly say to yourself that you are just not satisfied that this defendant is guilty, then you have a reasonable doubt and under those circumstances it would be your duty under the law to return a verdict of not guilty.

On the other hand, if after such comparison and such consideration of all the evidence as you have heard it from the witness stand you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and im-
61 portant matters of your own affairs, then you have no reasonable doubt and under those circumstances it would be your duty under the

law to return a verdict of guilty.

As you know, your verdict must represent the considered judgment of each juror. In other words, it is necessary that each juror agrees. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without doing violence to your individual judgments. Each of you must decide the case for yourself, but do so only after a consideration of the evidence by your fellow jurors. In the course of your deliberations, do not hesitate to change an opinion when convinced that it is erroneous, but do not surrender your honest convictions as to the weight of effect of evidence solely because of the opinion of the other jurors or for the purpose of returning a verdict. As you know, you are the sole judges of the facts in the case, ladies and gentlemen of the jury, and in this respect the Court cannot be of any assistance to you whatsoever. It is for you to decide the weight that you will give the evidence as you have heard it from the witness stand, and you should weigh carefully every fact and circumstance which has been submitted to you for your consideration. In judging the evidence, you must necessarily evaluate the testimony of the individual witnesses. Only thus can you determine the truth, and it is the truth that you must seek. You are the ones that pass upon the credibility of the witnesses, and in this respect you have the right to consider the manner of testifying when the witness was on the stand, whether the witness was evasive, whether there was a tendency to distort, whether the witness was frank and candid in his testimony, whether the witness was contradicted on material facts, whether the witness impressed you as a truth-telling individual, whether the witness impressed you as a person having an accurate memory and recollection, and you may also consider the probability or improbability of the testimony as told by a particular witness and its harmony or incongruity with other testimony in the case that you do find established beyond a reasonable doubt.

You are also instructed that if you believe from the evidence that any witness has intentionally testified falsely concerning any material fact about which the witness could not reasonably have been mistaken,

then you are at liberty to disregard the testimony of that witness or accept such parts as you may determine worthy of belief.

This is a prosecution, ladies and gentlemen of the jury, under the Code of Laws for the District of Columbia, Title 22, Section 2901, which
63 provides that whoever by force or violence, against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery.

The Government contends, ladies and gentlemen of the jury, that on or about February 16, 1957, within the District of Columbia, the defendant in this case either by force or violence, or against resistance or by sudden or stealthy seizure or snatching or by putting in fear, took from the person of Luther L. Thomas something of value. You are, therefore, instructed that if you believe and believe beyond a reasonable doubt, that this defendant on or about February 16, 1957, within the District of Columbia, by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear, took from the person or immediate actual possession of Luther L. Thomas anything of value, it is your duty under the law to return a verdict of guilty as indicted. If you have a reasonable doubt about it, of course you must return a verdict of not guilty, or if you do not believe that he did it, you must return a verdict of not guilty.

The defense in this case, ladies and gentlemen of the jury, is known as the defense of alibi. Literally translated, alibi means elsewhere. The
64 defendant takes the position that he is not guilty of the crime charged because he wasn't at the scene of the crime, and not being at the scene of the crime, he couldn't have committed the crime.

Now on this question of alibi, ladies and gentlemen of the jury, the defense does not have to prove an alibi beyond a reasonable doubt; neither does the defense have to prove an alibi by a preponderance of the evidence. All that is necessary is that the evidence that is presented by the defendant is sufficient to raise a reasonable doubt as to whether the defendant is guilty. So that if the evidence presented creates a reasonable

doubt in your mind whether or not the defendant was at the scene of the crime, then, of course, you must return a verdict of not guilty of this crime.

This is a serious case, ladies and gentlemen of the jury. It is serious from the standpoint of the Government and the standpoint of the defendant, and as I have cautioned jurors in the past, you should weigh very carefully the evidence that has been presented to you on both sides. Weigh it, sift it, analyze it, separate the evidence that you believe from the evidence that you disbelieve, and then apply to it the good, sound common sense that you would in the everyday affairs of your own life.

65 As the Court has advised you, your verdict must be unanimous. When you reach your jury room, select a foreman. When you have reached a verdict, please notify the marshal. Is there anything else, Mr. Miller?

MR. MILLER: No, sir.

* * * *

66 THE COURT: Ladies and gentlemen of the jury, it has been called to my attention there was more than one individual involved in this alleged crime. Of course, if you believe beyond a reasonable doubt from the evidence adduced at this trial that there were joint participants and they were all acting together, including the defendant, with a mutual understanding and with a common purpose and intent, and were concerned with one another in the commission of this offense, or with aiding, abetting, or assisting each other, of course, they would all be guilty. So that if you believe beyond a reasonable doubt that the defendant was concerned but that somebody else actually took the money, of course, he would be just as guilty as the other people -- if you believe that beyond a reasonable doubt. You must consider all the evidence in the case, including what happened and also the defense of the alibi, as well as anything else, because if you believe he wasn't there, he couldn't have been aiding and abetting either. Take the case, ladies and gentlemen.

* * * *

67 THE CLERK: What say you as to the defendant Robert J. Smith?

THE FOREMAN: We find the defendant Robert J. Smith guilty as charged.

THE CLERK: Members of the jury, your foreman says you find the defendant Robert J. Smith guilty as charged, and that is your verdict, so say you each and all? (The jurors answer in the affirmative.)

70 [Filed March 17, 1958]

Washington, D. C.
Friday, May 24, 1957

*

*

*

*

75 CLOSING ARGUMENT BY THE DEFENSE

MR. MILLER: Mr. Justice Curran and ladies and gentlemen of the jury, you told me -- you didn't tell me but told the distinguished Justice when you placed your hand on that good book in the presence of
76 almighty God that you would try this case from the evidence in the case, coupled with what the Justice would tell you of the law, and a true verdict render, so help you God.

Now, how on earth can anyone stand before an American jury and criticize two people that live at the house, who positively testified that on this particular day he is arguing about, the 15th -- the indictment charges the 16th, which was on a Saturday, and on a Sunday the boy was arrested at home. Where is the boy that arrested the man at home? Why isn't he here to help you out, to say what the man told him at his home? There is no evidence here. Where is the woman that was supposed to have been with this man when he was supposed to have been robbed? She is not here.

Now, ladies and gentlemen, in my struggle through life's uneven road around here for over 47 years, I want you to do what is fair and square from this evidence. And how on earth can you, as American jurors and citizens of my community, say beyond a reasonable doubt to a moral certainty that this is the man?

The District Attorney asks: Where were you on the 14th? Where were you on the 15th? How on earth could you tell, folks, with some people visiting you, where you were? He is arguing that on the 15th this thing happened in one breath, and then on the 16th he tells you it happened on a Saturday night, the 16th, and on Sunday the boy was ar-
77 rested. Where is the officer that went to that house on that particular day or morning and arrested him? The man said he identified him at the place. The man said he identified -- you folks, in your struggles, have seen people and talked to people, and say, "Hello, Jack," and you find out you made an honest mistake. I say I don't believe this

man deliberately came in here and perjured himself, but I think from all the evidence in the case, he is honestly mistaken.

I am not telling you what he says, "bring in a verdict of guilty." He has nothing to do with that. All he has to do is to present his case. You are the ones to determine whether he is guilty or not, and I say to you that after you hear all this case, all the evidence in this case, I ask you to do what is fair and square and let this boy go home with his folks.

* * * *

78 MR. MILLER: Your Honor, would you be good enough, if Your Honor will, please, to read the indictment to the jury? He is charged on the 16th, which is on Saturday.

THE COURT: Saturday morning.

MR. MILLER: Thank you. Sir?

THE COURT: Saturday morning can be the 16th, too.

MR. MILLER: The indictment charges on the 16th.

THE COURT: That is right.

MR. MILLER: It was a Saturday evening and at 12:45 a. m.

* * * *

79 Thursday, June 20, 1957.

The defendant appeared before the HON. EDWARD M. CURRAN, District Court Judge, at 10:14 a. m., on a motion to set aside verdict and order new trial, followed by sentencing.

APPEARANCES:

Joseph M. Hannon, Esq.,
Assistant U. S. Attorney,
for the Government.

Robert I. Miller, Esq.,
for the Defendant.

* * * *

80 ARGUMENT IN SUPPORT OF MOTION

MR. MILLER: May it please Your Honor, this case was tried before you and the jury was out a very long time, and after they came back in, I think everybody in the courtroom, except the jury, thought

81 the boy was innocent, and he wants to explain to you -- tell the

Judge what you want to say to him.

THE DEFENDANT: Your Honor, I wanted to explain to the Court-- this case that I am being charged for --

MR. MILLER: Talk loud so the Judge can hear you.

THE DEFENDANT: I said the case that the crime that I was charged with, I mean, I didn't commit the crime, but this girl who I used to go with at the time had the man to say I committed this robbery.

THE COURT: What is this now? You didn't write this, did you?

THE DEFENDANT: Sir?

THE COURT: You didn't write this?

MR. MILLER: You didn't write that motion, did you?

THE DEFENDANT: No.

THE COURT: I recognize the writing. I am getting these every day.

Now, what is this that you didn't have the effective assistance of counsel?

MR. MILLER: I tried the case, stayed with him, pled not guilty, went to the jail to talk with him and all.

THE COURT: What is this that you didn't have the effective assistance of counsel?

82 MR. MILLER: Why did you tell the Court you didn't have any assistance from me?

THE DEFENDANT: All my witnesses weren't here, sir, for one thing.

THE COURT: What witness?

THE DEFENDANT: Witness to the case.

MR. MILLER: We had no witnesses.

THE COURT: What witnesses are you talking about?

THE DEFENDANT: I mean, this lady living at 1608 --

MR. MILLER: Your Honor, he had two witnesses who testified he was there in bed. The two witnesses testified. Your Honor told the jury that the testimony of those two witnesses needed no corroboration. Your charge was clear, concise and convincing, and I was absolutely as

surprised as he was. I didn't think that that jury, after hearing the fine and fair charge that you always give, that they would convict him. I hope Your Honor can do the best you can. That is all I can say, sir. He was referred to the probation officer, and I think you have the report.

THE COURT: You were retained in this case, weren't you?

MR. MILLER: Yes, sir, I was retained: went to the jail to talk to him, came over here and tried the case, took pretty near a day to try it. I summonsed the witnesses. The two ladies testified he was home in bed, and you told the jury in that that they needed no corroboration in that.

MR. HANNON: It was a man and a woman, Your Honor, that testified in behalf of the defendant.

MR. MILLER: What is that?

MR. HANNON: A man and a woman.

MR. MILLER: I don't think the man is guilty, to tell you the truth.

RULING OF THE COURT

THE COURT: Well, the motion to set aside the verdict and order a new trial is denied.

* * * *

BRIEF FOR THE APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,247

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAY 21 1958

Joseph W. Stewart
CLERK

ROBERT J. SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEWELL BLAIR

421 Tower Building
Washington 5, D. C.

Attorney for Appellant
(Appointed by This Court)

STATEMENT OF QUESTIONS PRESENTED

The questions presented by appellant are:

1. Whether the rule concerning incompetency of defense counsel as grounds for new trial in appeal from trial court should be as strictly construed as in habeas corpus cases.
2. Whether the fact that defense counsel is selected and paid by defendant creates a conclusive presumption that defendant received the protection of the V and VI Amendments to the Constitution.
3. Whether in face of clear evidence as to time of alleged offense defense counsel's failure to offer any defense other than alibi for different time deprived defendant of the protection of the V and VI Amendments to the Constitution.
4. Whether defendant is entitled to new trial where incompetency of defense counsel is patent.

(iii)
INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
TRIAL PROCEEDINGS	3
a. The alibi	3
b. Cross-examination	4
c. Opening and Closing Statement of Defense Counsel	4
STATUTE INVOLVED	5
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. Applicability of V and VI Amendments to the Constitution	7
II. General Rule Respecting Incompetency of Defense Counsel as Ground for New Trial	8
III. Distinction Between Application of Rule in Habeas Corpus Cases and in Direct Appeals	9
IV. Selection and Payments of Counsel by Accused does not Create Conclusive Presumption of Adequacy and Effectiveness	10
V. Persistence in Establishing Alibi for Wrong Night	11
VI. Incompetency of Defense Counsel is Patent	11
CONCLUSION	12
APPENDIX	A-1

CITATIONS

Cases:

Amrine v. Tines, 131 F. (2) 827	7
Bostic v. Rives, 107 F. (2) 649, 71 App. D.C. 2	9
Burton v. United States, 80 App. D.C. 208, 151 F. (2) 17	10, 11, 12
Diggs v. Welch, 80 App. D.C. 5, 148 F. (2) 667	7, 9
Sherman v. United States, 241 F. (2) 329	10
Thomas v. District of Columbia, 90 F. (2) 424, 67 App. D.C. 179	7
United States v. Sumpter, 111 F. Supp. 507	12
United States ex rel Feeley v. Regan (CCA 7) 166 F. 2d 976	8, 12

INDEX (Cont'd.)

	<u>Page</u>
<u>Statutes:</u>	
D. C. Code, Title 22, Sec. 2901	1
Fifth Amendment	7, 10
Sixth Amendment	7, 10

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 14, 247

ROBERT J. SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a conviction for robbery (D. C. Code, Title 22, Sec. 2901). The date of the trial was May 24, 1957. The defendant filed a motion for new trial in propria persona (J. App. 4) on June 4, 1957. The District Court denied the motion and sentenced appellant to 2 to 7 years on June 20, 1957 (J. App. 5). On July 1, 1957, appellant sent to the District Judge in the form of a letter an application for leave to appeal in forma pauperis (J. App. 6), which was granted on November 27, 1957 (Marginal notation, J. App. 6). On December 2, 1957,

the Notice of Appeal was filed (J. App. 8). This Court has jurisdiction of the appeal under U. S. C. Title 28, Sec. 1291. Appellant has been confined in the District Jail or Lorton Reformatory since his arrest February 17, 1957.

STATEMENT OF THE CASE

This is an appeal in forma pauperis from a conviction for robbery. The Government's case, which consisted of the uncorroborated testimony of the complaining witness, Luther Thomas, and the testimony of a police officer present at a line-up two days after the alleged crime, was as follows:

About 8:15 on the evening of Friday, February 15, 1957, Thomas went to a restaurant at 7th & P Streets, N. W. where he made the acquaintance of a woman while sitting at the counter eating. About 12:30 a. m., Thomas and the woman left the restaurant and walked to 7th & H Streets, which he repeatedly identified as the 1500 block of 8th Street (R. 5, 6, 9). In the 1500 block of 8th Street, he was attacked by four men, whom he fought off for fifteen or twenty minutes. When he felt the chain attached to his pocketbook snap, from which he knew his pocketbook had been taken, three of the assailants ran, and Thomas grabbed the appellant, whom he then recognized, having seen him twice, once at Thomas' place of work and once at the defendant's place of work. Thomas did not then know appellant's name. After Thomas spoke to the defendant, the two stopped fighting. The appellant rejoined the other three men and the woman and the five of them went back "to a crowd", presumably of bystanders. Thomas ran back to the restaurant, encountering a police officer on the corner of 7th & P Streets. The pocketbook contained \$32.00. At the trial Thomas did not know the name or address of the woman companion. The police officer testified that the appellant had been arrested at his home by another officer at 6:30 Sunday morning and that Thomas had identified the appellant at a police line-up at 10:30 Sunday morning. No warrant had been issued.

The defense was an alibi sought to be established by two witnesses. There were no exhibits or evidence other than the testimony of the two witnesses on each side.

DESCRIPTION OF THE TRIAL PROCEEDINGS

a. The Alibi

At the beginning of the trial the prosecution established on direct examination of Thomas, the first witness, the time of the alleged crime as the night of Friday, February 15, 1957 (App. 10, Tr. 21), and the hour as between 12:30 and 1 o'clock that night (App. 11, Tr. 23) which would be on the calendar day of February 16. Defense counsel on cross-examination of Thomas again established the hour of the alleged crime as after 12 o'clock Saturday morning (App. 15, Tr. 32).

In his opening statement defense counsel announced that the defense would be an alibi for Saturday night. Direct examination of defendant's first witness sought to establish an alibi for Saturday night and to fix the time of arrest at around 6 o'clock Sunday morning. On cross-examination, however, this defense witness also showed that the time the crime was alleged to have occurred was 12:45 Saturday morning (App. 23, Tr. 47). With his second and last witness, defense counsel continued to establish an alibi for Saturday night (App. 24, Tr. 49).

On recall, the police officer testified concerning the appellant's statements of his activities Friday night, beginning at 11:30 and in particular at 12:45 a. m. Saturday morning.

The closing argument by the Government again brought out the fact that the important hour was Friday night not Saturday night (R. 74). The closing argument by defense counsel does not refer to the time (App. 33-34). In his argument in rebuttal, the Government's counsel explained in detail that the hour of the alleged crime was at 12:45 Saturday morning, about forty-five minutes after midnight.

Defense counsel then made his final effort to establish the time as Saturday night by asking the Court to read the indictment. The Court made clear that the time (of the alleged crime) was Saturday morning the 16th; whereupon defense counsel said, "It was a Saturday evening and at 12:45 a.m.". The Court in its instructions to the Jury did not comment on the confusion as to the time of the alleged crime.

b. Cross-Examination.

The Government presented two witnesses in its case in chief. One witness was recalled after the close of the defendant's case. Hence, there were three opportunities for cross-examination.

Cross-examination of the complaining witness was limited to seeking an admission that Thomas had testified at the arraignment. There was no re-cross-examination after a redirect examination of Thomas.

Cross-examination of the police officer consisted in effect of four leading questions asking the police officer to confirm the appellant's protestations of innocence.

After the close of the defendant's case, the police officer on recall by the prosecution to rebut the defense of alibi related what the appellant had said concerning his whereabouts at forty-five minutes after midnight on February 16th. Cross-examination consisted of two questions and answers:

"Q. He definitely told you, Sergeant, that he had nothing to do with this case. Didn't he? A. Oh yes, he told me.

Q. And isn't it true he told you that he got home on the 16th and went to bed, isn't that the truth? A. He told me, Yes, Sir". (App. 27, Tr. 57).

c. Defense Counsel's Opening and Closing Statements.

Defense counsel's complete opening statement was:

"Mr. Miller: Ladies and gentlemen of the jury, I expect to show you from the evidence that the defendant was home on this Saturday night, that he arrived home some time in the evening before 10, 11 o'clock and was in bed from that time until the good officers came and arrested him". (J. App. 20)

It should be noted that this statement was made after Thomas had fixed the time of the alleged time on direct examination and defense counsel had further established it on cross-examination.

The closing argument does not discuss any fact in the case and does not mention the discrepancy between the time established by the prosecution and the time covered by the alibi.

STATUTES INVOLVED ¹

The only statute involved is D. C. Code, Title 22, Sec. 2901, which reads as follows:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years".

STATEMENT OF POINTS

1. The District Court erred in over-ruling the Motion for new trial.
2. The District Court erred to fail to order a new trial on the ground that the defendant did not receive a fair trial due to incompetency of defendant's counsel even though defendant's counsel was selected and paid by defendant.

SUMMARY OF ARGUMENT

The appellate court should construe the rule for granting new trial on the grounds of incompetency of counsel more liberally in direct appeals from the trial court than in habeas corpus cases. In habeas corpus proceedings, where the sole question is the jurisdiction of the trial court, the incompetency must be such as to deprive the court of jurisdiction. In direct appeals the whole proceedings are before the appellate court for review, and there is no presumption of regularity.

¹ See Appendix, post, for text of V and VI Amendments to the Constitution.

It is well settled that the right to assistance of counsel means effective assistance. Mere selection by client and payment of a fee neither convert incompetency into effective defense nor prevent defense from being a sham or farce. While the application of the rule regarding incompetency of counsel may well be more strictly construed toward retained counsel selected by the appellant than appointed counsel, nevertheless, it is still the duty of the appellate court to see that the defendant below had a fair trial.

The persistence of defense counsel establishing an alibi for the wrong night is a clear proof of incompetency of the defense.

The cumulation of the failure to cross-examine, the alibi for the wrong night, the ignoring of the efforts of the prosecution to show that the time of the alleged crime was a day earlier than the time for which the alibi was established, and closing statement made the trial a farce.. amounting to a denial of due process and demonstrate lack of effective assistance of counsel.

ARGUMENT

I. APPLICABILITY OF V AND VI AMENDMENTS
TO THE CONSTITUTION.¹

The due process clause of the Fifth Amendment guarantees a fair trial. Thus, the applicability of the Fifth Amendment to this case depends on whether the lack of any defense at all prevents a trial from being fair within the meaning of due process.

It is well settled that the Sixth Amendment guaranteeing an accused the right to have assistance and this means effective assistance. (Thomas v. District of Columbia, 90 F.2d. 424, 67 App. D.C. 179). The due process requirement of the Fourteenth Amendment extended the protection of the Sixth Amendment to defendants in State Courts. Hence, the phrase "due process of law" used in connection with incompetency of counsel in State Courts means "the Sixth Amendment". In thus referring to the Sixth Amendment, the Circuit Court of Appeals for the 10th Circuit, stated in Amrine v. Tines, 131 F.2d. 827:

"Due process of law, as we comprehend it, does not necessarily include or exclude representation by counsel. The substance of due process may be denied although the accused is represented by a coterie of counsel, yet he may have it although unaccompanied by counsel. Due process, or the lack of it, is based upon substance and not form. Powell v. Alabama, supra; Norris v. State of Alabama, 294 U.S. 587, 590, 55 S.Ct. 579, 79 L.Ed. 1074; Avery v. State of Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377; Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716. Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 326, 86 L.Ed. 166".

It is not enough that an accused have counsel, or that counsel be competent when appointed or retained. Amrine v. Tines on this point is in conflict with Diggs v. Welch, 148 F.(2) 667, 80 App. D.C. 5, which in an opinion by Judge Arnold held:

"It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel. It does not mean that the constitutional rights of defendant are impaired by counsel's mistakes subsequent to a proper appointment."

¹ See Appendix, post, for text of V and VI Amendments to the Constitution.

This language in Diggs v. Welch appears to negative the general statement that assistance of counsel means effective assistance.

II. GENERAL RULE RESPECTING INCOMPETENCY OF DEFENSE COUNSEL AS GROUND FOR NEW TRIAL.

A good statement regarding incompetency of counsel as grounds for new trial is set out in United States Ex Rel. Feeley v. Regan (CCA 7) 166 F.2d. 976, where the Court in a habeas corpus proceedings in an opinion by Judge Minton, then Circuit Judge, held,

"Whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise, he would not be in good standing at the bar and accepted by the court. The constitutional requirements have been met as to the necessity for counsel. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty of justice, such conduct might be considered on the proposition that such a trial was a denial of due process. The conduct of counsel in the trial of a case is that of only one of the officers of the court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama. The best of counsel makes mistakes. His mistakes, although indicative of lack of skill or even incompetency, will not vitiate the trial unless on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce (Citing Diggs v. Welch, 80 App. D.C. 5, 148 F.2d. 667)."

Under this rule to justify a new trial the incompetency of defense counsel must be such that on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce. Appellant is not making a point by point second guess of each detail and is not asking for a review of mistakes or error in judgment, but asks the Court of Appeals to consider the conduct of the defense as a whole.

III. DISTINCTION BETWEEN APPLICATION OF RULE IN HABEAS CORPUS CASES AND DIRECT APPEALS.

Most of the decisions on incompetency of counsel are in habeas corpus cases in which a judgment of conviction may be attacked only on jurisdictional grounds. Bostic v. Rives, 107 F.(2) 649, 71 App. D.C. 2. Since inadequacy of defense counsel in such cases must be such as to destroy the jurisdiction of the trial court to render a judgment, the rule with respect to absence of effective representation should be more strictly construed than in appeals. This is implied in Bostic v. Rives, supra, where the Court said "Errors not involving jurisdictional questions must be attacked through an appeal."

In direct appeals, the whole proceedings are before the appellant court for review, and there is no presumption of regularity of proceedings. Attention is particularly called that the trial judge approved this appeal in forma pauperis (J. App. 6).

In Diggs v. Welch, supra, probably the most quoted case on incompetency of counsel, Judge Arnold was particularly careful to show that the court was concerned only with habeas corpus cases in applying the rule of strict construction of absence of effective representation:

"For these reasons we think absence of effective representation should be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it. We do not believe that allegations even of serious mistakes on the part of an attorney are ground for habeas corpus standing alone. The cases where the Supreme Court has granted habeas corpus on the ground there was no fair trial support this interpretation of the absence of effective representation. They are all cases where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice." (Emphasis Supplied)

IV. SELECTION AND PAYMENT OF COUNSEL
BY ACCUSED DOES NOT CREATE
CONCLUSIVE PRESUMPTION
OF ADEQUACY AND EFFECTIVENESS.

The trial court appeared to attach some significance in the fact that defense counsel was selected and paid by appellant.¹ Selection and payment of defense counsel by accused does not waive protection of the Fifth and Sixth Amendments. Appellant's counsel has found no case in the Federal Court where incompetency of counsel selected and paid by the accused was found to be sufficient grounds for new trial, and absence of such cases is understandable. In every Federal court case examined the appellate court specifically found that defense counsel was adequate and competent. It is of course true that an accused is normally bound by the actions of his counsel. "It has been many times held that hindsight is not the proper measure for determining [competency of counsel], and it has as often been held that the Constitution does not guarantee that counsel appointed for, or employed by defendant shall measure up to his notions of ability or competence" (Sherman v. U.S., 241 F(2d) 329). But this case is not just a matter of hindsight. The Court of Appeals of the District of Columbia in a per curiam opinion has indicated that there is no conclusive presumption of adequacy of counsel selected by and paid by an accused.

"After judgment and on appeal, errors in judgment as to the conduct of the defense are easy to point out. Here the appellant selected his counsel and made no objection to his conduct of the case during trial. Under such circumstances it is well settled that error in judgment, incompetency or mismanagement of the defense by counsel is generally not ground for a new trial. This is not to deny that a defendant's rights may be so 'flagrantly disregarded by counsel of his own choosing, and as a consequence, justice so manifestly miscarry', that a new trial should be ordered." (Emphasis Supplied) Burton v. United States, 151 F. 2d 17, 80 App. D.C. 5.

¹ J. App. 36.

V. PERSISTENCE IN ESTABLISHING AN ALIBI FOR THE WRONG NIGHT.

There is no sharp distinction between mistake (necessarily a big one) and incompetency of counsel. The purpose of defense counsel is to convince the jury that the accused did not commit the act which the indictment and the prosecution alleged. When it is made perfectly clear to the jury and it is confirmed by the Court (J. App. 34) that the alleged crime was committed on Saturday morning and the defense counsel persists in maintaining a defense for a crime alleged to have been committed on Sunday morning, defense counsel is in effect setting up a defense for a different crime, a defense for a crime not described in the indictment. If defense counsel is unable to fulfil his purpose, then he is incompetent for the purpose of the particular trial. Assuming that defense counsel made an honest mistake in believing that the indictment meant Saturday night or Sunday morning, his persistence in his mistake under all the circumstances can only be ascribed to incompetence. Obviously, the appellant has been denied the protection of the Fifth and Sixth Amendments if he was represented in the trial court by incompetent counsel.

VI. INCOMPETENCY OF DEFENSE COUNSEL IS PATENT.

The failure to cross-examine might be considered an error in judgment. The debacle of the alibi might be laid to incompetency or mismanagement. But the closing argument to the jury is the culminating blow which brings this case within the rule of Burton v. U. S., supra. Up to the time of the closing argument, defense counsel had literally done nothing to show that the appellant was not guilty of the alleged crime other than to have provided two witnesses whom, on cross-examination - no mention on direct examination - testified that the appellant was home at the time of the crime as fixed by the prosecution. The closing argument of defense counsel (J. App. 33) defies analysis. At the sentencing defense counsel could not remember whether his witnesses were man or woman (J. App. 36). When the case went to the jury, the

defense could be described as a vacuum. Such a complete absence of effectiveness of counsel can only be ascribed to incompetency.

CONCLUSION

It is not contended that the trial proceedings were a farce and a mockery of justice in the theatrical sense, nor that either the judge or prosecuting attorneys were at fault. But appellant does state that the whole defense consisting of cross-examination (or lack of it) plus the alibi for the wrong night plus the argument to the jury amounted to such a farce (i.e., a ridiculous proceeding; an absurd failure) and a mockery (i.e., a false show or sham) of justice as to require a new trial.

As stated in U. S. v. Sumpter 111 F. Supp. 507, l.c. 511, the appellant is entitled to a fair trial, not a flawless one. He is entitled to a reasonably competent counsel, not an infallible one. But without a reasonably competent counsel, he cannot have the fair trial which the Fifth Amendment requires.

However, it is not necessary that the trial below was reduced to a farce and a mockery. The proceedings are not being attacked collaterally, but on direct appeal. If the accused was not afforded a fair trial due to incompetency of counsel, and the point has been raised on a direct appeal, timely taken, it should be sufficiently to show that "the representation was of such low caliber as to amount to no representation".

Surely, this case comes within the exceptions described in Burton v. U. S. ex rel. Fesley v. Regan, supra.

NEWELL BLAIR

Counsel for Appellant
(Appointed by this Court)

APPENDIX

The Fifth Amendment to the Constitution of the United States reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

defense could be described as a vacuum. Such a complete absence of effectiveness of counsel can only be ascribed to incompetency.

CONCLUSION

It is not contended that the trial proceedings were a farce and a mockery of justice in the theatrical sense, nor that either the judge or prosecuting attorneys were at fault. But appellant does state that the whole defense consisting of cross-examination (or lack of it) plus the alibi for the wrong night plus the argument to the jury amounted to such a farce (i.e., a ridiculous proceeding; an absurd failure) and a mockery (i.e., a false show or sham) of justice as to require a new trial.

As stated in U. S. v. Sumpter 111 F. Supp. 507, l.c. 511, the appellant is entitled to a fair trial, not a flawless one. He is entitled to a reasonably competent counsel, not an infallible one. But without a reasonably competent counsel, he cannot have the fair trial which the Fifth Amendment requires.

However, it is not necessary that the trial below was reduced to a farce and a mockery. The proceedings are not being attacked collaterally, but on direct appeal. If the accused was not afforded a fair trial due to incompetency of counsel, and the point has been raised on a direct appeal, timely taken, it should be sufficiently to show that "the representation was of such low caliber as to amount to no representation".

Surely, this case comes within the exceptions described in Burton v. U. S. ex rel. Fesley v. Regan, supra.

NEWELL BLAIR

Counsel for Appellant
(Appointed by this Court)

APPENDIX

The Fifth Amendment to the Constitution of the United States reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FILED

1958

Joseph D. Stewart
CLERK

REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,247

ROBERT J. SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEWELL BLAIR

421 Tower Building
Washington, D. C.

Attorney for Appellant
(Appointed by this Court)

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,247

ROBERT J. SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY STATEMENT OF FACTS

Prior to receipt of appellee's brief, present counsel for appellant had not been informed of the existence of prior proceedings in this court described by appellee as Miscellaneous No. 862.

REPLY ARGUMENT

The Points Raised by Appellant are Timely.

This is not a collateral attack on the judgment of the trial court but an appeal as a matter of right. Appellant is not required to give the grounds for appeal in order to exercise his rights of appeal. Grounds for appeal are necessary only in a motion to appeal in forma pauperis to satisfy the court to whom the motion is presented that the appeal is not frivolous. The appellant is not bound or limited by his motion.

Whether or not points raised in this appeal were presented to the Court of Appeals in Miscellaneous No. 862 is irrelevant. The trial judge granted an appeal in forma pauperis upon a timely motion and later letter in support of such motion; both the motion and letter in rather polite layman's language included as grounds for the motion the inadequacy of defense counsel (J. App. 5, 7 and Appellee's Brief, 2, 3). As appellee points out, "management of the defense by counsel is generally not ground for new trial". Appellee's brief states:

"Appellant's present counsel apparently has found the allegations previously brought to the attention of both this Court and the District Court to be without substantial merit, in view of the sole reliance on new allegations respecting appellant's former defense counsel." (Appellee's Brief, 7)

Of the items listed in the appellant's motion and letter, only the inadequacy of defense counsel is a ground for new trial, a fact doubtless well known to the trial judge and therefore presumably his grounds for granting the motion. There are no new allegations respecting appellant's former defense counsel; there are new illustrations of his inadequacy. The merits of the other allegations referred to are also irrelevant if as a matter of law they are not grounds for new trial.

Appellant's present counsel submits that the points raised on this appeal are not ones which defendant, with only a grade school education, could intelligently raise without even a transcript of the record. Appellant's failure to present the pertinent facts and questions to the Court of Appeals in Miscellaneous No. 862 was anticipated by Judge Bazelon in his dissenting opinion in which he said,

"I think we cannot rest our decision on the chance that this lay petitioner has sufficient education, native intelligence or experience with the intricacies of law to present a substantial question, assuming that one exists. Since the impact of *Griffin v. Illinois*, 351 U.S. 12 (1956), was first appreciated, this Court has not denied leave to appeal in forma pauperis from a judgment of conviction without appointing counsel, as is now required by *Johnson v. U.S.*, 352 U.S. 575 (1957).

I think it plain that Johnson requires us to appoint counsel to prepare and present a petition before we determine whether the questions are frivolous; see my dissent in Hill v. U.S., entered July 31, 1957¹. . . See Farley v. U.S., 354 U.S. 521 (1957)".

Appellant Was Clearly Prejudiced by Conduct of His Counsel.

Defense counsel employed three defense tactics: an alibi, cross-examination, and an argument to the jury. When the alibi was so misplaced, when the cross-examination did not touch on any fact of the crime or alibi, and when the argument does not even attempt to support the alibi or attack the case of the prosecution, the defendant's case is certainly prejudiced in the minds of the jury. When the only effort of establishing an alibi for the time the alleged crime was alleged to have been committed is made by the prosecution on cross-examination, such evidence has by its manner of presentation been impeached.

The prosecution's case consists of a single, uncorroborated witness, who testified the crime was committed in front of a crowd and promptly reported to the police. (J.App. 13). And yet not even the police officer was in court to testify that the complaining witness looked like one who had been set upon by four assailants and fought for "15 or 20 minutes". (J. App. 11). Such a weak case is naturally strengthened by the literal absence of a defense.

Appellee states,

"All of the matters that appellant desired to present to the court and the jury respecting his whereabouts on the night (or early morning) in question obviously were brought out in the respective testimonies of the two alibi witnesses. Appellant apparently was satisfied by the sum total of their testimonies, for he notably failed to complain about the examination of these witnesses until about a year following his conviction. And, even now he fails to show what further information helpful to him the witnesses could reasonably furnish at a new trial". (Appellee's Brief, 9)

¹ 248 F. 2d. 635

At the time of sentencing and hearing on motion for new trial appellant told the trial court that all his witnesses were not in court. Since testimony of other witnesses was available at the time of the trial, its omission is not a ground for new trial, and there is no point in burdening this Court with matters it cannot consider. The complaint about the examination of witnesses has been made at the first opportunity after availability of a transcript of the trial proceedings. What more could have been presented is not a part of the record and not pertinent to this appeal.

Consideration of the Case as a Whole.

Appellant has not complained of any specific errors because with the exception of the alibi for the wrong night the mismanagement of the defense is cumulative. No one specific item is a substantial ground for new trial. Lack of substantial cross-examination is only important because of the confusion about the alibi and the type of argument to the jury. Moreover, for appellee to say that the two defense witnesses were subjected to "vigorous examination" on direct examination by defense counsel (Appellee's Brief, 8), is just ridiculous. Neither of these "vigorous" examinations are a full page long in the Joint Appendix (p. 20 and 23).

The problem before the court is whether taking the case as a whole the appellant had a fair trial. To aid in deciding that question appellant has presented four questions (Appellant's Brief, (i)), none of which the government has attempted to answer other than to imply that defense counsel's past experience and the fact that he was retained exempt him from criticism.²

² One place or another appellee's brief uses the terms "retained counsel" 14 times and "counsel chosen * * *" 2 times. Yet there is no comment on appellant's question No. 2, "Whether the fact that defense counsel is selected and paid by defendant creates a conclusive presumption * * *".

CONCLUSION

The conduct of the defense in the trial court shows that appellant did not have effective representation by counsel.

Respectfully submitted,

NEWELL BLAIR

421 Tower Building
Washington, D. C.

Attorney for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,247

ROBERT J. SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

OLIVER GASCH,

United States Attorney.

CARL W. BELCHER,

JOSEPH M. HANNON,

HAROLD D. RHYNEDANCE, JR.,

Assistant United States Attorneys.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Following a jury trial in which appellant was represented by retained counsel of considerable experience, the former was found to have committed robbery between 12:30 A.M. and 1 A.M. on Saturday, February 16, 1957. At the trial, the victim gave positive and unrefuted testimony that during a scuffle with four men in which his pocketbook and money were stolen, he grabbed one of them, appellant, and recognized him as a person he had seen on two prior occasions. At a subsequent lineup and at the trial, the victim positively identified appellant as the person he grabbed during the fight. Appellant introduced two alibi witnesses who testified that he came home early on the night of the day on which the crime was committed as well as on the three nights immediately proceeding that day.

Therefore, the questions presented, in the opinion of appellee, are as follows:

1. In the light of the entire record, did not appellant receive the effective assistance of his retained counsel at the trial?

2. Was appellant prejudiced by the fact that his retained counsel questioned the two alibi witnesses only respecting the night of the day on which the crime was committed, even though such witnesses testified on cross-examination that appellant was home (and therefore not at the scene of the crime) on the three nights immediately preceding that day?

INDEX

	Page
Counterstatement of the Case.....	1
1. <i>Background of Appellant's Complaints</i>	1
2. <i>The Trial Proceedings</i>	3
Statute Involved	5
Summary of Argument	6
Argument:	
I. <i>Appellant's Present Contentions, Set Out In His Brief For The First Time, Are Afterthoughts Deserving Lim- ited Consideration</i>	6
II. <i>Appellant Was Not Prejudiced By The Conduct Of His Retained Counsel At Trial</i>	8
Conclusion	12

TABLE OF CASES

<i>Burton v. United States</i> , 80 U.S. App. D.C. 208, 151 F.2d 17 (1945), <i>cert. denied</i> , 326 U.S. 789 (1946).....	10
<i>Diggs v. Welch</i> , 80 U.S. App. D.C. 5, 148 F.2d 667 (1945), <i>cert. denied</i> , 325 U.S. 889 (1945)	10, 11
<i>Felton v. United States</i> , 83 U.S. App. D.C. 277, 170 F.2d 153 (1948), <i>cert. denied</i> , 335 U.S. 831 (1948).....	10
<i>Johnston v. Jones</i> , 66 U.S. 209 (1861).....	8
<i>Storm v. United States</i> , 94 U.S. 76 (1876).....	8
<i>United States ex rel. Feeley v. Regan</i> , 166 F.2d 976 (7th Cir. 1948)	11

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,247

ROBERT J. SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment was returned on April 15, 1957, charging appellant with the offense of robbery in the District of Columbia "on or about February 16, 1957" (J.A. 2). At arraignment on April 18, 1957, appellant appeared with retained counsel, Robert I. Miller, Esq., and entered a plea of not guilty (J.A. 2-3). Appellant and his counsel appeared at the jury trial held on May 24, 1957, at the conclusion of which a guilty verdict was returned and appellant was remanded to the District of Columbia Jail (J.A. 3).

1. *Background of Appellant's Complaints*

A motion to set aside verdict and order new trial, filed by appellant on June 4, 1957, alleged the insufficiency of the evidence and the ineffective assistance of his retained counsel, Mr. Miller (J.A. 4-5). As respects the latter allegation, appellant, while professing "all due respect for Mr. Miller's past reputation and ability," complained solely that the "defense lacked vigor due to the age and in-

firmities" of his retained counsel, that such counsel failed to investigate certain phases of the case, and that Mr. Miller's infirmities prevented his conferring with appellant and actively investigating the allegations. No allegation is found respecting any errors by Mr. Miller during the course of the trial itself.

On June 20, 1957, the trial court heard and denied appellant's motion for a new trial,¹ after which he was sentenced to a term of from two to seven years (J.A. 5-6). Thereafter, appellant's judgment and commitment were filed on June 24, 1957, and on June 28, 1957, his application to proceed on appeal in forma pauperis, filed June 25, 1957, was denied with the notation "not taken in good faith."

Appellant then sought permission to appeal in forma pauperis by a petition filed in this Court on August 5, 1957, in Miscellaneous No. 862, said petition being opposed by appellee on August 7, 1957. Appellant filed a reply (denominated by him as an "answer"), in which he specified in six paragraphs (lettered "A" through "F") the grounds on which an appeal was sought. Such grounds included allegations respecting the failure of the trial judge to direct a verdict of acquittal, the failure of defense counsel to subpoena witnesses, the failure of such counsel to establish that the arrest was illegal, the insufficiency of the evidence, the giving of false testimony by the complaining witness, and the failure of the Government to prove the element of intent. Again, no complaint was made respecting specific errors in the trial proceedings as are now asserted on the instant appeal. After the filing of a short reply by appellee, the Court denied the petition by order dated September 13, 1957.

Following the completion of the above-noted proceedings in Miscellaneous No. 862, appellant took no further action. However, the District Court (Curran, J.) thereafter considered and acted upon a letter dated July 1, 1957, which

¹ At the hearing on the motion, appellant, admitting that he had not written the motion, urged only that an unspecified woman should have been produced at a witness (J.A. 35). But no showing was made as to her expected testimony.

appellant had transmitted to the former shortly after filing with the District Court the previously noted application to proceed in forma pauperis, together with a notice of appeal. In the letter, appellant advised the trial judge of certain matters (grouped in four numbered paragraphs) allegedly supporting the application. Three of these matters, dealt with the sufficiency of the evidence, and the possible availability of other evidence. The fourth and last matter (denominated as number "5" in the letter) specifically referred to the prior motion to set aside verdict and order a new trial and elaborated on that portion of the motion respecting the alleged inability of his retained counsel, Mr. Miller, to present the facts in the case. Appellant, in this regard, complained solely of the alleged lack of consultation by Mr. Miller with his client, the alleged refusal of Mr. Miller to allow appellant (who admits that "I told him I had a record") to take the stand, and of the alleged "recognizable fact that Mr. Miller is too old and infirm to present a forceful and adequate defense . . ." (J.A. 6-8). Since appellant, again, failed to raise any of the issues asserted in his brief respecting the conduct of his counsel during the trial itself, the granting by Judge Curran on November 24, 1957, of leave to appeal in forma pauperis must be considered to have been predicated solely on the above-noted grounds—all of which now appear to have been abandoned.

On December 2, 1957, a notice of appeal was filed (J.A. 8).

2. The Trial Proceedings

In view of the limited issue presented on the instant appeal respecting the alleged ineffectiveness of retained counsel at trial, the summary of the trial proceedings, which follows hereinafter, is somewhat abbreviated.

Luther Thomas, the complaining witness,² testified that, on Friday, February 15, 1957, he was employed and received his pay. After getting off from work, he went to a restaurant for something to eat at about 8:15 P.M. He met a girl there, and went out with her at about 12:30

² His testimony is set out at J.A. 9-17.

or 12:40 A.M. (on December 16, 1957). While walking with her, he was approached by four men. They engaged him in a scuffle, during which his pocketbook was broken off its chain and stolen. At the trial, appellant testified that the pocketbook was worth over four dollars and contained thirty two dollars and some papers.

The witness had no trouble identifying appellant as one of the four assailants because, in the fight, Thomas grabbed appellant and spoke to him; further, at the conclusion of the fight, appellant picked up and tossed back the witness' footwear. Although Thomas did not then know appellant's name, the former had previously seen the latter on two occasions—once when appellant came to the place where the witness was employed and again when the witness delivered something where appellant worked.

After the fight, appellant went down the street to where the other assailants were standing. The witness noticed at that time that the girl he had met was standing with appellant and the other men.

The witness made an immediate report to the police, and appellant thereafter was arrested. Appellant was identified by Thomas in a subsequent line-up as well as at the trial.

Thomas was cross-examined respecting his testimony in the proceedings previously held in this case in the Municipal Court on February 18, 1957. In this regard, the witness was asked whether he had testified that this event occurred on a Saturday night, but Thomas responded only that it had taken place early on a Saturday morning. He did not disclose what had been the purport of such testimony. Responding to further questions, the witness admitted that appellant had denied the robbery to the police; further, Thomas stated that he had not talked to the police on the morning of the trial and did not know the whereabouts of the woman, who was then being sought by the police. (J.A. 14-16.)

Elroy A. Short, a detective assigned to investigate the robbery, had his partner arrest appellant. The witness testified as to the denial by appellant of the robbery and

the identification by Mr. Thomas of appellant as one of the four men who robbed him. (J.A. 17-19.)

On cross-examination, the witness was further questioned as to the denial by appellant of the crime, the circumstances under which the latter was arrested, the whereabouts of the arresting officer, and what appellant had told the officer by way of an alibi (J.A. 19-20).

Upon the conclusion of the Government's case, appellant's counsel, Mr. Miller, stated that the defense would be one of an alibi (J.A. 20).

Elsie Hall, appellant's aunt, and *Sam Robertson*, who is a roomer at the Mrs. Hall's home, testified on direct examination that appellant also lives there. They further testified that appellant came home early Saturday evening (of the day of the crime) and stayed in the house until arrested by the police on the following morning. On the respective cross-examinations, the witnesses gave positive testimony that appellant was home early, went to bed, and remained in the house throughout the evenings of February 16 as well as February 13, 14, and 15, 1957. As respects Friday evening, February 15, Mrs. Hall testified that appellant left the house and returned for the night before 11 P.M. (J.A. 22-23), while Mr. Robertson recalled that appellant was in his room by 10 or 11 P.M. and thereafter (J.A. 25-26).

Officer Short was recalled to the stand by the Government and questioned as to what appellant had told him about his whereabouts on February 16, 1957, at 12:45 A.M. On cross-examination, Mr. Miller elicited an admission that appellant had denied to the officer that he had anything to do with the case, but stated he had gone home to bed. (J.A. 27.)

The closing argument for the defense (J.A. 33) and the trial court's instructions to the jury (J.A. 31-32) noted that appellant's defense was one of alibi, *viz.*, he was not at the scene of the crime at the time in question.

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides as follows:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching,

or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

SUMMARY OF ARGUMENT

Although appellant has previously made a number of allegations (not found in his brief) respecting the assistance afforded by the experienced trial counsel retained to defend him at trial, the former has apparently abandoned those contentions. Instead, he has made new ones respecting such counsel for the first time on the instant appeal. In the posture of this case, his most recent allegations not only are afterthoughts deserving slight consideration but lack substantial merit.

The crucial issue now presented for the Court's determination is whether or not the record as a whole shows that appellant was prejudiced by the representation afforded at the trial by counsel of his own choosing. In the light of the record, we submit that nothing further that defense counsel might possibly have done by way of preparation, examination or argument could reasonably have aided appellant. On the record and the law, appellant clearly had the effective assistance of counsel.

ARGUMENT

I

Appellant's Present Contentions, Set Out in His Brief for the First Time, Are Afterthoughts Deserving Limited Consideration

None of the grounds asserted in appellant's brief on the instant appeal have been alleged by him, even inartistically, in any of the post-trial proceedings in the District Court or in this Court in Miscellaneous No. 862. As seen from the Counterstatement, appellant has complained about his retained counsel on various grounds following the trial, but has notably failed to allege any of the errors now asserted.

The present allegations are such as would undoubtedly have occurred to appellant during the posttrial proceedings, if he had thought that he had been prejudiced thereby. It is no answer to say that appellant did not have the advice of qualified counsel subsequent to trial³ for the type of allegations are such as should logically have occurred to the former when he filed the various papers noted in the Counterstatement.

Appellant may not excuse his belatedness in alleging the errors described for the first time in his brief on the basis that "the trial judge approved this appeal in forma pauperis" (brief, p. 9), for the latter obviously did so on the basis of the specific allegations made in appellant's letter, dated July 1, 1957, but which are nowhere to be found in appellant's brief. The situation described in the Counterstatement appears such as to suggest that Judge Curran, after having first denied appellant's application to proceed on appeal in forma pauperis in June, 1957, when the trial was fresh in the memories of all concerned, decided some five months later to give appellant the benefit of any possible "doubt" raised by his subsequent allegations by granting him leave to so proceed. Such permission was granted even after this Court, possibly unknown to the trial judge, had disposed of specific allegations (made by appellant in Miscellaneous No. 862) by an unpublished order denying the latter's petition.

Appellant's present counsel apparently has found the allegations previously brought to the attention of both this Court and the District Court to be without substantial merit, in view of the sole reliance on new allegations respecting appellant's former defense counsel. It follows that the allegations now so belatedly raised in appellant's brief are afterthoughts deserving scant attention by the Court. This becomes all the more apparent from the fact that appellant, who failed to testify at the trial, was positively identified by the victim as one of several men who attacked him. It should be noted that defense counsel

³ Appellant, however, seems to have had the assistance of counsel not officially qualified (J.A. 35).

drew from the complaining witness and the police officer who testified for the Government admissions that appellant had consistently denied any connection with the crime. Further, the alibi testified to on appellant's behalf by two witnesses covered the night (or early morning) of the day in question as well as other nights before and after the crime was committed.

Since all the essential facts were before the trial court and the jury, which properly resolved the issue of credibility posed by the respective testimonies, appellant's belated contentions should not be accorded any great weight at this posture of the case.

II

Appellant Was Not Prejudiced by the Conduct of His Retained Counsel at Trial

While acknowledging "all due respect for Mr. Miller's past reputation and ability" (J.A. 5) and, further, admitting that the latter "was selected and paid by defendant" (brief, p. 5), appellant now attempts to support his complaint respecting his former defense counsel with contentions that the latter mistakenly or otherwise sought to establish an alibi for the wrong night (or early morning) and that he did not properly cross-examine witnesses or submit a closing argument to the jury. No other trial errors are now asserted.

As respects the alibi furnished by the two defense witnesses, their testimony on cross-examination—as acknowledged by appellant through his present counsel (brief, p. 11)—placed appellant at home at the time of the crime. The witnesses were subjected to vigorous examinations by counsel for both parties, and it cannot reasonably be claimed that further direct examination respecting the night (or early morning) in question would have been any more helpful to appellant. Looking at the complete examinations of the witnesses, as this Court must do,⁴ it cannot

⁴ Appellate courts must consider both the examinations-in-chief and the cross-examinations to determine whether or not appellant had a fair trial and proper representation. *Storm v. United States*, 94 U.S. 76, 85 (1876); *Johnston v. Jones*, 66 U.S. 209, 226 (1861).

be said that appellant was prejudiced by any failure on the part of his defense counsel to develop fully on direct examination what ultimately was brought out on cross-examination.

Whether or not any omission by defense counsel to develop the point fully may be attributed to accident or design, no one can say for certain. Appellant may not complain about matters falling within the management of the defense. Furthermore, some credit must be accorded to Mr. Miller's extensive professional experience and recognized ability as a criminal trial attorney, certainly more than appellant now would attribute to him. Appellant's posttrial complaints as to his former counsel should not obscure the fact that the latter was deliberately retained by appellant who apparently was satisfied with the representation he received, at least up to the time that he was remanded to the D.C. Jail following the verdict.

In interposing the defense of alibi, appellant must be presumed to have supplied the individuals and the information necessary to sustain his position. All of the matters that appellant desired to present to the court and the jury respecting his whereabouts on the night (or early morning) in question obviously were brought out in the respective testimonies of the two alibi witnesses. Appellant apparently was satisfied by the sum total of their testimonies, for he notably failed to complain about the examination of these witnesses until about a year following his conviction. And, even now he fails to show what further information helpful to him the witnesses could reasonably furnish at a new trial.

What more could have been done by defense counsel to bring out further facts helpful to appellant respecting the latter's whereabouts at the time in question is not apparent from a study of the record in its entirety. It seems apparent that the elicitation by the prosecutor of information helpful to the defense could have created a more favorable impression upon the jury than if, instead, it had been brought out by defense counsel in a routine direct examination of witnesses obviously friendly to appellant. Thus

appellant was in no way prejudiced by the representation he received, which we submit is the crucial issue in this case.

As respects the cross-examination and closing argument by defense counsel, the record shows that the Government witnesses were questioned in a manner indicating study of the case and prior preparation, and that defense counsel made a closing argument to the jury (not analysed by appellant) which was consistent with the record and appropriate to the defense. The record further reflects that defense counsel diligently and successfully objected to certain questioning by the prosecution, a matter ignored by appellant on this appeal.

Appellant's present contentions respecting such cross-examination are somewhat general and fail to show how he was prejudiced by any failure on the part of his retained counsel to prolong his cross-examination by asking additional questions. Such matter, however, relates solely to trial strategy falling within the professional qualifications of trial counsel. As this Court has stated, "management of the defense by counsel is generally not ground for new trial." *Burton v. United States*, 30 U.S. App. D.C. 208, 209, 151 F.2d 17, 18 (1945), *cert. denied*, 326 U.S. 789 (1946). And, any suggestion "that it is the duty of this Court to substitute its judgment of the proper tactics in the trial of the case for that of the lawyer of the forum in the forum is baseless and unacceptable." *Felton v. United States*, 83 U.S. App. D.C. 277, 278, 170 F.2d 153 (1948), *cert. denied*, 335 U.S. 831 (1948). See *Diggs v. Welch*, 80 U.S. App. D.C. 5, 148 F.2d 667 (1945), *cert. denied*, 325 U.S. 889 (1945). No good reason appears in this case to depart from those principles.

Defense counsel's obviously considered refusal to prolong his questioning seems merited in the light of the record. As seen from the Counterstatement, appellant's conviction rests upon the complete identification supplied by the victim of what may have been a planned scheme and certainly of a ganged assault. Appellant sought to interpose the defense of alibi, yet decided not to take the

stand in his own defense.⁵ In this posture, interrogation as to clothing, previous observations of appellant, a more complete description of the woman, and the wallet chain might only have served to detract from the theory of the defense.

This is clearly a case of credibility, clear and convincing evidence, and trial tactics. It is not a case of manifest injustice. Viewing the record as a whole, the representation accorded appellant by counsel of his own choosing may not be said to constitute the violations of the Fifth and Sixth Amendments now asserted.

Appellant notes with approval the decision in *United States ex rel. Feeley v. Regan*, 166 F. 2d 976 (7th Cir. 1948), which relies on the decision of this Court in *Diggs v. Welch*, *supra*. As seen from that portion of the *Feeley* case quoted by appellant in his brief (p. 8), the mistakes of counsel," . . . although indicative of lack of skill or even incompetency, will not vitiate the trial unless on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce" (166 F. 2d at 980-981). Such is not the case here.

We join with present counsel for appellant in asking the Court to review the conduct of the defense as a whole, not "mistakes or error in judgment" (brief, p. 8). But such review may validly be conducted only in the light of the record as a whole, which, in this instance, clearly shows that appellant was not prejudiced by any conduct or possible omissions of his retained defense counsel so as to require a reversal of the judgment below.

⁵ Significantly, defense counsel skillfully drew admissions from the complaining witness and the police officer on cross-examination that appellant consistently denied his guilt (J. A. 20).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,

United States Attorney.

CARL W. BELCHER,

JOSEPH M. HANNON,

HAROLD D. RHYNEDANCE, JR.,

Assistant United States Attorneys.

